Fordham Law Review

Volume 14 | Issue 1 Article 3

1945

McKelvey on Evidence—A Review

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McKELVEY ON EVIDENCE—A REVIEW

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THERE is an old saying that "the test of ability is a record of achievement." McKelvey's record shows that during the past 50 years he has written five editions of a hand-book on the Law of Evidence, all of which have been excellent and outstanding contributions to a better understanding of this difficult legal subject. His remarkable achievement is now further emphasized by the appearance late last year of his latest edition,[1] at a time which almost marks the "golden anniversary" of his first edition.[2] As the actor's success upon the stage is popularly reflected in the repeated encores which greet his splendid performances, so McKelvey's talented efforts, over the past 50 years, have won the deserved encores and plaudits of a grateful legal world; and the appearance at quite regular intervals of each new edition gives further evidence, in and by itself, of the honor due the author, for his work so well done. We know of no better way of paying tribute to McKelvey at this time than by a review of his latest accomplishment. This treatise on the Law of Evidence has long since found its place in the Hornbook Series,—a series of treatises on all of the principal subjects of the law, written by outstanding legal authorities and enjoyed by countless thousands of students of the law, throughout the nation.

The preface is a model of humility and respectful appreciation of the author's preceptors. He prides himself in the opportunity enjoyed at Harvard Law School, under the teachings of Langdell, Ames, Gray and Thayer. He particularly refers to James B. Thayer, who was then at the apex of his brilliant teaching career, and whose favorite subject was Evidence. He gives Thayer credit for any merit in the work and for the insight obtained and the active interest aroused as a result of personal contact with that eminent teacher "in classes then so small that they were more a series of round table discussions than formal lectures."[3] The author confesses that he "has endeavored to transmit the understanding of the subject originally gained under Thayer's teaching, supplemented by succeeding observation, study and experience in the practical application of the rules of evidence for more than half a century, to those who today are beginning a career in a field in which the author's career is drawing to a close."[4]

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Book Review of McKELVEY ON EVIDENCE. By John Jay McKelvey. (Fifth Edition). St. Paul: West Publishing Company. 1944. pp. xxiv, 814. $5.00. Unless otherwise specified, page and chapter references in footnotes will refer to this text.

1. The fifth.
2. The first edition was published in 1897.
3. P. v.
4. P. vi.

In the preface to the first edition the author wrote, "The present treatise is the embodiment of an attempt to restate the principles of the law of evidence in a manner easy of comprehension by the student and for the practitioner easy of application."[5] That sentence also describes the purpose and the attainment of the fifth edition.

McKelvey recognizes the swing of the pendulum of sentiment through the years, from the too rigid application of the old rules to the modern extreme of liberality in the desire to get rid of rules. As he correctly points out, "the traveler is quite as likely to be lost in a maze of uncertainty by too many signs as he is to be left in doubt by too few."[6] He suggests as a remedy, "That a wider discretion should be allowed to the trial judge . . . for the rules are to be regarded as a part of the machinery for ascertaining the real facts, and not as barriers to their disclosure."[7]

He points out that "Wigmore performed a gargantuan task in assembling, considering, classifying, discussing and recording the thousands upon thousands of decisions which poured in a never ceasing and steadily increasing stream from the appellate courts."[8] Wigmore's ten-volume treatise on the Law of Evidence testifies to his herculean task, and yet it has been aptly remarked, "Any thoughtful lawyer who will merely thumb the pages of Wigmore will be convinced that the existing law of evidence is in hopeless confusion."[9]

The author frankly admits that his purpose is "to treat the law as it is, not as it ought to be or as it perchance may be in the future."[10] He seeks "to trace the rules to their source, so that a clearer conception of their purpose might be gained and thus promote a more understanding application in the trial of cases."[11] And then he continues, "In the preparation of this fifth edition, the changes in the treatment of the various topics discussed have been with a view to greater clearness and more orderly arrangement. Recent citations will be found and earlier ones, in some cases, omitted."[12] In these respects, he has generally succeeded.

The most significant change is the addition of a new, separate chapter dealing with Pictorial Evidence. As McKelvey explains, "This subject had a minor place in the chapter on Writings in previous editions, but

5. P. vi.
6. P. vi.
7. P. vi.
8. P. vii.
9. P. viii.
10. P. x.
11. P. ix.
12. P. x.

has attained so important a role in trials that it is deserving of greater attention on the part of the student as well as the practitioner."[13]

A glance at the Table of Contents reveals that McKelvey follows the customary order in the treatment of the subject matter, and this summary review will follow the same sequence. A Table of Cases at the end of the book lists approximately 5000 cases cited, and by itself indicates the tremendous work which has been compressed in this single volume. Copious footnotes supplement the text and set forth numerous authorities. A clear index with reference to pages completes the book. A further aid to the reader in locating particular subject matter quickly is accomplished by sub-dividing each main chapter heading into clearly expressed sub-heads, each of which is set forth in bold type for ready reference, with a detailed discussion beneath.

The style throughout is simple, direct and clear, free from unnecessary verbiage and confusion. For example, the introductory chapter[14] establishes the place of evidence in the law, defines and distinguishes "evidence" and the "law of evidence," points out the origin of the law of evidence, stresses the fact that justice will make elastic the rules, emphasizes the functions of the court on the trial in determining the admissibility of evidence, and concludes that the law of evidence is concerned chiefly with deciding what are evidentiary facts. The pleadings and the admissions of the parties will determine what facts are in issue. Then at the trial, the rules of evidence are applied. And these rules, which sometimes become very complex and troublesome, all stem from two basic rules. The first basic rule is founded upon logic and common sense, namely, whatever is irrelevant is inadmissible. Naturally, if the proof offered to establish the facts in issue is not logically probative thereof, it is irrelevant and inadmissible. The second basic rule is really a corollary of the first, and it provides that whatever is relevant or logically probative of the facts in issue is admissible, unless it is excluded by some law or rule of evidence. Thus a study of the Law of Evidence is a study of these exclusionary rules. Our jury system is chiefly responsible for the existence of these exclusionary rules. Many relevant facts are kept out of evidence simply because the law fears that more harm than good will result from a knowledge of those facts by jurors.

From this simple but complete introduction, the author proceeds naturally to the chapter dealing with "Judicial Notice."[15] Facts, which are admitted by the formal pleadings or by stipulation of the parties are not in issue and need not be proved by evidence at the trial. Likewise,

13. P. x.
14. Chap. 1.
15. Chap. 2.

there are many facts of such common knowledge that the law will require no formal proof of those facts. What people generally know will be "judicially noticed" by the courts. Thus McKelvey writes of this doctrine, "It has to do with evidence, in a negative sense, in that it teaches when evidence need not be given. It is not always necessary to prove every fact which goes towards the making up of a case. The fact may be of such a nature that the court either cannot or will not require any proof."[16] From that plain observation, McKelvey develops the subject of Judicial Notice by a consideration of numerous illustrations in which the principle has been applied.

Critical comment is here made of the author's discussion of the question of the judicial notice by the courts of one State of the statutes of another State or foreign jurisdiction.[17] Thus he states in a footnote,[18] "In New Jersey, the law of a sister state at a given time is a 'question of fact' which *must* be ascertained by competent proof . . . . Also in New York, the question of what is the law of the foreign jurisdiction is one of fact, and such law *must* be proved as facts are proven."[19] The author fails to note or mention that under existing New Jersey statutory law,[20] "Whenever the common or statute law of any State, territory or other jurisdiction of the United States, is pleaded in an action in any court of this State, the court shall take judicial notice thereof." Likewise, he fails to note or mention that under a new New York statute,[21] effective September 1, 1943, an important change has been made in New York, greatly increasing the discretionary power of both trial and appellate courts in that State to take judicial notice of the laws, statutes, proclamations, edits, decrees, ordinances, unwritten or common law of a sister state, a territory or other jurisdiction of the United States, or of a foreign country or political subdivision thereof. This far-reaching New York statute[22] allows New York courts also to notice judicially private acts and resolutions of the state legislature and of Congress, as well as municipal ordinances and resolutions, and even the rules and regulations of public boards and agencies of the State, municipalities thereof, and of the United States. Therefore, the text must be read in the light of new statutes and decisions, which may declare a contrary result in a particular jurisdiction.

The chapter dealing with "Questions of Law and Questions of Fact"

16. P. 22.
17. P. 45.
18. P. 46, n. 51. Italics added.
19. Citing Read v. Lehigh Valley R. Co., 284 N. Y. 435, 31 N. E. (2d) 891 (1940).
20. N. J. Laws 1942, c. 104, N. J. S. A. 2:98-28.
21. N. Y. Laws 1943, ch. 536, N. Y. Civ. Prac. Act, § 344a.
22. *Ibid.*

is written with a clarity that makes this troublesome problem easy of comprehension.[23] Many questions arise during the course of the trial which require the determination of the trial judge. Other questions must be left for solution by the jury. Particularly important is the author's stress upon the fallacy that all questions of law are for the court and all questions of fact are for the jury. His numerous illustrations of the court's function in passing upon questions of fact as a preliminary to their admission in evidence are most helpful and go a long way in dissipating the illusion that fact questions are always for the jury. Again, the footnote cases explanatory of what constitutes matter of *fact* and matter of *law* in negligence actions are well chosen.

In discussing the "burden of proof,"[24] which must be sustained at the trial by the party who asserts the affirmative of the issue, true emphasis is placed upon the distinction between this burden of proof, which is determined by the pleadings and never shifts during the progress of the trial, and the "burden of proceeding or going forward," which often shifts from one party to the other during the trial.[25] Likewise, the author clearly points out the true relation between a "prima facie" case and the burden of proof, in that the establishing of a "prima facie" case has no effect upon the ultimate burden of proof, though it shifts from the shoulders of him who has made it the burden of proceeding. And then, the elementary difference between the quantity and the quality of the evidence is similarly stressed, for "our system has never determined a case merely upon number of witnesses."[26] Of course, the number of witnesses may become important, where other things are equal or where there is an express provision of law, as in treason cases, in which the testimony of two witnesses becomes necessary.

The subject of "Presumptions"[27] is very comprehensively treated. Presumptions "as inferences" are clearly contrasted with presumptions "as rules of law." Then there is the distinction between "prima facie" presumptions, which may be rebutted by contradictory evidence, as in the case of an unexplained absence of seven years or more,[28] and the absolute or conclusive presumptions, which are hard and fast rules of law, as in the case of the age-old common law presumption that one under the age of seven years is conclusively presumed incapable of committing a crime.[29]

23. Chap. 3.
24. Chap. 4.
25. P. 101.
26. P. 109.
27. Chap. 5.
28. P. 127.
29. P. 144, N. Y. PENAL LAW § 816.

This matter of presumptions is subdivided, so as to include separate discussion of the principal presumptions, such as death after seven years absence, the legitimacy of children, the receipt of letters properly addressed and mailed, the capacity to commit crime, knowledge of the law, survivorship at common law in common disasters, innocence in criminal cases, legality, regularity, and the like. There is also a subdivision concerned with the legal doctrine of *res ipsa loquitur,* which is often referred to erroneously as a presumption. When a case falls within the doctrine of *res ipsa loquitur,* it simply means that from the facts presented the jury may find negligence, but they are not required by any rule or presumption to find a party negligent. McKelvey treats extensively of what he calls "spurious" presumptions, which are not true presumptions in a legal sense, but rather "merely modes of expressing certain applications of the principles of the subject of judicial notice, or are statements of certain general principles and maxims in the law, having nothing to do with evidence or inference."[30] In this group, he includes the presumptions of sanity, intent as to the natural and probable consequences of one's acts, the laws of other jurisdictions, legality, regularity, innocence and many others. The classifying of presumptions as true or spurious adds nothing of value to a knowledge of the subject, and may on the contrary lead to confusion and misunderstanding. If in the trial of an action the matter will be presumed, either prima facie or conclusively, what can be gained by labelling the presumption involved real or spurious? It is not like the author's able treatment of the so-called "conflicting" presumptions or inferences, from which we can gain the valuable rule of evidence to the effect that in the case of conflicting presumptions, the stronger will prevail.[31] For example, if there is a conflict between the presumption of innocence and the presumption of continuity, the former is regarded in the law as the stronger and will therefore outweigh the latter.

The chapter on "Admissions"[32] is simply, yet well covered. Formal admissions, which may be made by a party in his pleading, or by stipulation before trial, or by statement in open court, are compared with what the author calls "evidential" admissions, described by him as a "*statement* by a party (at some previous time) of a fact inconsistent with a fact attempted to be established by him at the time of trial."[33] The use of the descriptive word "evidential" is hardly desirable. It is not well chosen as a contrast to "formal," since all relevant admissions

30. P. 145.
31. P. 171.
32. Chap. 6.
33. P. 175.

are generally evidential. Would not the word "informal" or "extra judicial," or, as some put it, "unsolemn" be preferable? Further, the definition of an evidential admission as a "statement" is not broad enough, since there may be implied admissions and admissions by conduct, as well as statement, as the author himelf subsequently points out in this chapter, in his discussion of "indirect admissions."[34] Thus, it is a well known rule that evidence of silence in the face of an accusation is admissible, as an admission by conduct, even though the party against whom it is used made no statement.

In logical sequence follows a chapter on "Confessions" as admissions of guilt made by persons accused of crime.[35] McKelvey always tries to state the prevailing rule of evidence. Thus we read, "Confessions to be admissible in evidence must be voluntary; if made as the result of threats or inducements, they are inadmissible."[36] This is a good statement of the common law rule[37] and of the prevailing opinion, but one must be warned that it may not be the precise rule of a particular jurisdiction. Of course, the author frequently sets forth the views of other jurisdictions in footnote references. Thus, in New York, we note that a confession is "voluntary," unless made under the influence of fear produced by threats, or unless made upon a stipulation of the District Attorney not to prosecute.[38] Therefore, it is not every inducement in New York which renders the confession involuntary, but only the stipulation of the District Attorney that the accused shall not be prosecuted. Again, the author in limited space cannot point out the particular rules of every state, for example, the sharp distinction in New York between the duty of a magistrate to inform the accused of his legal rights and the absence of any such duty on the part of an arresting officer or the District Attorney to warn the accused that any statement he may make may be used against him.[39] But otherwise the text is comprehensive and includes even consideration of the legal effect of confession made under the influence of liquor.[40]

McKelvey makes justifiable criticism of a harsh New York rule, which allows an accused to withdraw a plea of guilty, with the court's permission, and then in a subsequent trial on the merits permits evidence to be introduced to show that the accused previously pleaded

34. P. 181.
35. Chap. 7, p. 221.
36. P. 224.
37. P. 231.
38. N. Y. CODE CRIM. PROC. § 395.
39. People v. Ferola, 215 N. Y. 285, 109 N. E. 500 (1915); People v. Mondon, 103 N. Y. 211, 8 N. E. 496 (1886).
40. P. 235.

guilty to the crime.[41] As Lehman, J. pointed out in the dissenting opinion in a New York case, "When the State allows a man a trial, the trial should be fair; when the court decides that in the interest of justice a plea may be withdrawn, because there would be possible danger of injustice in acting upon it, the accused should be placed in the same position as if the plea had never been made."

"A confession alone is insufficient to prove the crime charged. Corroborating evidence is required."[42] This statement by the author naturally leads to a consideration of the necessity of establishing the "corpus delicti." For as he says, "The corroborating evidence must be sufficient to establish prima facie, at least, the corpus delicti, which is defined as consisting of the act and of the criminal agency of the act, irrespective of its connection with the accused."[43] Particular note is made of the difficulty found in a New York case,[44] involving a felony murder, in applying these inter-related rules dealing with confessions and the corpus delicti. In that instance, the defendant confessed the homicide and that he was at the time committing robbery. But there was no other proof *as to the robbery,* except the confession. The New York statute declares that a confession is insufficient to warrant a conviction "without additional proof that the crime charged has been committed."[45] Corroboration, therefore, as to the homicide, without similar corroboration as to the felony, robbery, was held to be sufficient. This holding is contrary to an earlier New York case involving the same legal question.[46]

The admissibility of evidence obtained as the result of an excluded confession, and the admissibility, in the State courts, of evidence wrongfully obtained as the result of an unlawful search and seizure, are both considered in this chapter on confessions.[47] The distinctive, contrary rule in the Federal courts, as to evidence resulting from an unlawful search and seizure, is stressed. It is regrettable that there should exist such an obvious lack of harmony, between the Federal and the State tribunals, on this basic point.

McKelvey's discussion of "confessions of third parties"[48] is reassuring. The theatre and the motion pictures have often dramatized the

41. P. 237, Kercheval v. U. S. 274 U. S. 220 (1927); People v. Steinmetz, 240 N. Y. 411, 148 N. E. 597 (1925).

42. P. 238.

43. P. 239.

44. People v. Lytton, 257 N. Y. 310, 178 N. E. 290 (1931).

45. N. Y. CODE CRIM. PROC. § 395.

46. People v. Joyce, 233 N. Y. 61, 134 N. E. 836 (1922).

47. Pp. 241, 243.

48. P. 246.

scene, wherein the innocent man on trial is saved at the last minute by the "confession," perhaps of the death-bed variety, of some third person not on trial. But as a matter of technical law, these death-bed confessions have not been and are not now admissible in evidence to prove the innocence of the defendant on trial. They are not admissible as dying declarations, because they are not made by a victim naming his assailant or the circumstances of the fatal attack upon him. Nor are they admissible as declarations against interest, because they are merely against the "penal" interest, and not against the "pecuniary or proprietary" interest, as required by the rules of evidence. McKelvey strongly criticizes the law, which excludes these confessions. Thus he quotes from Mr. Justice Holmes, ". . . no other statement is so much against interest as a confession of murder; it is far more calculated to convince than dying declarations, which would be let in to hang a man."[49] And he sums up his criticism in these words, "Reluctance to leave the hallowed precincts of precedent for the free open fields of common sense and common humanity. Unwillingness to be first to depart from a course conceded to be wrong."[50] There seems to be no good reason, except technical rules of evidence, why a person accused of crime should not have the benefit of such a confession by another as a piece of circumstantial evidence.

The chapter on "Relevancy"[51] contains all of the well known rules for the exclusion of relevant testimony, because of its immateriality, or its unfair tendency in the particular case to create undue confusion, delay, surprise or prejudice. Included here is the rule which provides that the quality of an insensate object, at a time in issue, may be evidenced by other manifestations of its quality at other times, under similar conditions. But human conduct is not so uniform and therefore the quality of human conduct at a time in issue may not be proved by showing how a person acted on some other occasion. There is the qualifying rule, known as *res inter alios acta,* in which other instances of human conduct are admissible to prove notice, knowledge, intent, motive, identity or a common scheme.

The peculiarity of the New York rule as to the admissibility in condemnation proceedings in New York City (but not in New York State generally) of other sales of comparable real estate to prove value is indicated and a footnote, sets forth fully the statutory provision as to trial procedure.[52] Again, the inadmissibility of subsequent acts of pre-

49. Donnelly v. U. S., 228 U. S. 243, 278 (1913).

50. P. 247.

51. Chap. 8.

52. P. 263; *In re* Thompson, 127 N. Y. 463, 28 N. E. 389 (1891); N. Y. C. ADMIN. CODE § B-15-16.0.

caution to show previous negligence is stressed. In brief, this chapter is replete with numerous examples, and where the rule stated is not universally followed the author in an annotation takes pains to point it out as in the New Jersey case in which the law of that State is sharply at variance with the law of New York, on the elementary question of whether or not evidence is admissible to show that thousands of other persons used the common passageway, where plaintiff fell, without harmful results.[53]

The rules of evidence with reference to "character" evidence in the trial of criminal and civil actions are succinctly set forth.[54] Starting with the basic rule that the character of a person may not generally be shown for the purpose of proving his conduct, McKelvey states the rule in criminal cases. The accused may prove such traits of character as tend to make it improbable that he would or could have committed the crime charged. But the prosecution may not introduce evidence as to the bad character of the accused, unless the accused first opens the door by offering evidence as to his good character. Of course, in actions such as libel and slander, where character itself is a fact in issue, evidence to prove that it is good or bad is admissible. The distinction between "character," what a man is, and "reputation," what people suppose him to be, is pointed out. Likewise, we note the anomaly in the law which prohibits proof of a person's character, except by proof of his reputation, even though we know that one may have a good character and a bad reputation, and vice versa. The very acts which evidence good or bad character may not be testified to, nor may the witness state his opinion of the person's character. He is limited to telling what others think and say, or negatively that he heard nothing against his character. The character of a witness for veracity may always be shown to affect his credibility. Also, the criminal record of a witness may be used against him, to affect his credibility. This use of the criminal record is an outgrowth of the common law rule which disqualified a person convicted of crime from being a witness. That old rule has long since been abandoned, but the new rule is firmly fixed. Is it just, sound or logical to allow use of a criminal record to affect credibility? Does not the present rule, under the guise of testing credibility, cause injustice and prejudicial inferences? Finally in this chapter, special rules applicable to rape and other sexual crimes are noted as *sui generis*.

"Opinion" evidence, both lay and expert, is fully treated.[55] The

53. Temperance Hall v. Giles, 33 N. J. L. 260; Crocheron v. North Shore Ferry Co., 56 N. Y. 566 (1874).

54. Chap. 9.

55. Chap. 10.

primary difficulty of distinguishing legally between "matter of fact" and "matter of opinion" is simplified by the use of numerous examples. The basic reasons for the allowance of opinion evidence are first, aid to the jury, and secondly, difficulty on the part of the witness in otherwise testifying. If the opinion will not aid the jury, then the opinion is not admissible, whether given by an expert or a lay witness. The distinction between expert and non-expert opinion evidence is important. Where the non-expert renders an opinion, it must be based upon facts observed by him. It cannot be based upon the so-called hypothetical question. The expert on the other hand may give an opinion, based upon admitted facts, or facts already testified to by other witnesses at the trial, which facts may not have been personally observed by the expert. Of course, one may be "expert," without necessarily being a "professional."

But before an expert may render an opinion, as such, he must be duly qualified. Special attention is given by the author to those types of cases in which opinion testimony is most frequently resorted to, namely, in handwriting (including typewriting) disputes, in cases involving one's sanity and in matters relating to foreign law. As to the last mentioned, McKelvey briefly states, "What the foreign law is on any particular subject is a question of fact. Yet it is beyond the knowledge of the average person."[56] The qualification of one to testify as an expert is a preliminary matter to be determined by the court. The weight to be given to the expert's testimony is for the jury. Likewise, the question of damages is for the jury to determine and is not properly the subject of expert testimony, although experts may testify to the value of the article before and its value after the alleged happening, leaving it to the jury to subtract the difference to determine damage.

McKelvey points out the use of opinion testimony by non-experts as well as experts in sanity cases.[57] The footnotes, however, stress the special rule in New York, in the case of the non-expert, wherein generally he is limited to testifying to facts observed and then the "impressions" made by those facts upon his mind, as to whether the person in question was "rational" or not.[58] The general rule throughout the country[59] allowing the non-expert to state his opinion as to sanity upon facts personally observed seems much more desirable than the limited, technical New York rule. "This is on the very reasonable theory that persons of ordinary intelligence, accustomed to associate in business and in a social way with the person in question, are peculiarly qualified to judge

56. P. 341.
57. Pp. 369-370.
58. P. 372, n. 25.
59. Connecticut Mutual Life Ins. Co. v. Lathrop, 111 U. S. 612 (1884).

of his mental competency."[60]

The author devotes 130 pages to the "hearsay" evidence rule and its many exceptions.[61] After stating the rule generally and stressing that these exclusionary rules are being relaxed in proceedings before quasi-judicial bodies such as administrative agencies, pursuant to statutes creating those agencies, McKelvey differentiates between the generally known "real" exceptions and the "apparent" exceptions to the rule. In the latter instances, the "hearsay" is admitted because of its value as circumstantial evidence, as proof that the statement was made, rather than as proof of its contents. Keeping that distinction clearly in mind helps to a better understanding of the cases. The "real" exceptions are then discussed in detail and include the usual matters of pedigree, the shop-book rule, declarations in the regular course of business, declarations against interest, dying declarations, matters of general or public interest, public documents, ancient documents, the "res gestae" rule, declarations of mental conditions and declarations of testators. The text throughout this chapter is generously supplemented by copious footnotes, in which the author cites not only many New York cases, but also those of other American jurisdictions as well as early English common law cases and rules. The discussion of each sub-heading is clear, complete and well-illustrated by cases. It should be observed that the early cases cited should be read with the warning that later cases and statutes in particular jurisdictions may have brought about a different conclusion. Thus the author's statement that "dying declarations are admissible only in cases of homicide"[62] should not cause the student of New York or New Jersey law to forget that in these states, dying declarations are also admissible in "abortion" actions today, although not so in the early cases.[63] Again, the author's statement as to the admissibility generally of "records of births, deaths, and marriages"[64] must be read by New York students in the light of the New York cases[65] and statutes,[66] if one is to apply New York law to a particular case.

The chapter on "witnesses"[67] comprehensively covers the subject matter, both from the viewpoint of "competency," as well as that of "privi-

60. P. 370.

61. Chap. 11, pp. 380-510.

62. P. 474.

63. N. Y. CODE CRIM. PROC. § 398a; People v. Davis, 56 N. Y. 95 (1874); State v. Corson, 108 N. J. L. 12, 157 Atl. 103 (1931).

64. P. 492.

65. Beglin v. Metropolitan Life Ins. Co., 173 N. Y. 374, 66 N. E. 102 (1903); Thomas v. Morris, 286 N. Y. 266, 36 N. E. (2d) 141 (1941).

66. N. Y. CIV. PRAC. ACT § 372.

67. Chap. 12.

lege." The statement that "at the present time there is no exclusion upon the ground of religious belief, or the lack of it,"[68] is true generally, and particularly so in New York,[69] but is not true everywhere. Thus, in New Jersey an atheist may testify as a "party" in his own behalf, but not as a "witness" for another.[70] Parties interested are no longer disqualified. Nor today are persons incompetent as witnesses because previously convicted of crime. However, the interest of the witness or his record of conviction may be used to affect credibility. The competency of one spouse to testify *for* the other is generally recognized today.[71] However, vestiges of the common law disability are still retained, more or less, in varying degrees, in the different jurisdictions, when it is a matter of one spouse testifying *against* the other,[72] and of course, the old rule prohibiting the disclosure of confidential communications between husband and wife is still retained. The author includes a discussion of the competency and privilege of infants, insane persons, grand and petit jurors, judges, attorneys, physicians, clergymen and newspaper reporters. The rules of evidence are not uniform throughout the United States. Thus physicians and clergymen are privileged in New York,[73] but not so in New Jersey.[74] Reporters are protected by statute in New Jersey against compulsory disclosure of the source of their information,[75] but not so in New York.[76] So, one reading this treatise on Evidence must constantly remember that it is a general textbook, expressing the majority viewpoint, generally, and while the author tries valiantly to state contrary views of particular States, the limitation of space in one volume does not permit such development of the subject matter. For example, in stating that a failure by the accused to testify furnishes no ground for an inference against him,[77] one must be careful to compare the principle enunciated with the rule adopted in the particular jurisdiction. He may find a variance.[78]

The matter of privilege against self-incrimination is well treated *and particularly one might* read with profit the paragraph explaining that

68. P. 514.
69. Brink v. Stratton, 176 N. Y. 150, 68 N. E. 148 (1903); N. Y. CONST. Art. I, § 3.
70. Percey v. Powers, 51 N. J. L. 432, 17 Atl. 969 (1889).
71. P. 518.
72. N. Y. CIV. PRAC. ACT §§ 346 and 349; N. J. S. A. 2:97-4.
73. N. Y. CIV. PRAC. ACT §§ 351-352
74. State v. Morehous, 97 N. J. L. 285, 117 Atl. 296 (1922); Bahrey v. Poniatishin, 95 N. J. L. 128, 112 Atl. 481 (1920).
75. N. J. S. A. 2:97-11.
76. *In re* Mooney, 269 N. Y. 291, 199 N. E. 415 (1936).
77. P. 534.
78. State v. Gimbel, 107 N. J. L. 235, 151 Atl. 756 (1930).

"the privilege is limited to the jurisdiction in which it is claimed."[79] Do not the new cases indicate a swing away from the protection of that ancient constitutional guarantee? And is that tendency sound? One might well reflect upon the author's statement, "The United States courts hold that the privilege against self-incrimination is non-existent when the answer would not tend to show commission of a federal crime by the witness, even though it might tend to show commission of a state offense."[80]

The chapter dealing with the "Examination of Witnesses"[81] explains the ordinary trial procedure, including both direct and cross-examination, as well as re-examination, and the limitations thereof. The use of "leading questions," which suggest the answer, is generally objectionable on direct examination, except in the case of an ignorant or hostile witness. But such questions are permitted on cross-examination. The well known prohibition against impeaching one's own witness is contrasted with methods for neutralizing surprise testimony. The use of a memorandum to refresh the recollection of the forgetful, friendly witness is compared with the use of a memorandum or previous statement as a foundation for the neutralizing process. The text is not too clear on the extent to which contradictory statements of a witness who is not a party to the action may be used against him.[82] Perhaps the law itself in the several jurisdictions is not too clear or harmonious on the point, since some states adopt a broad view[83] and others limit the contradictory statements to that which was subscribed or sworn.[84] The author might also have developed a little more fully the extent to which cross-examination may be used, in asking a hostile witness about acts of criminality or immorality of his past life, where the acts are not supported by a criminal record. And should not the rule to the effect that the answers of the witness to such questions are binding upon the examiner, if the matters inquired into are collateral to the issue, be set forth?

The "best evidence" rule and the "parol evidence" rule each with their numerous exceptions are ably treated in the chapter on "Writings."[85] However, it does not seem proper to include in this chapter on

79. P. 542.

80. P. 543; U. S. v. St. Pierre, 128 F.(2d) 979 (C. C. A. 2d 1942); Feldman v. U. S. 322 U. S. 487 (1944).

81. Chap. 13.

82. P. 577.

83. State v. Bien, 95 N. J. L. 474, 113 Atl. 248 (1921); Lenz v. P. S. Ry Co., 98 N. J. L. 849, 121 Atl. 741 (1923).

84. People v. De Martini, 213 N. Y. 203, 107 N. E. 501 (1914); N. Y. Civ. Prac. Act §343a.

85. Chap. 14.

writings a discussion of the subject of "real" or "demonstrative" evidence. There seems but very slight relationship between the two. A consideration of "real" evidence might more properly be included in a chapter defining the various kinds of evidence. Yet both subjects are amply covered in this particular chapter. The illustrations of the use of real evidence are very vivid and not likely to be forgotten. The bar of such evidence when used to create sympathy is sensible.

In considering the best evidence rule, does the author mean to imply that the "minutes" of the meeting are not the best evidence of the corporate proceedings?[86] Many states regard them as the best evidence.[87] His statement as to this point is not clear. Likewise, clarity might be improved in distinguishing between the use of a "notice to produce" and a *subpoena duces tecum.* Is it not generally provided that the former is served only upon a *party* and failure to comply allows the use of secondary evidence; whereas, the *subpoena duces tecum* is generally served upon a *witness,* not a party, but may also be served upon a party, and failure to comply with it more severe penalties than the mere possible use of secondary evidence?

The sections in the chapter concerned with handwriting[88] seem repetitious, and add nothing to similar treatment of the same subject matter in the sections in the chapter dealing with opinion evidence[89] in matters of handwriting. True, repetition does not harm, but is it necessary in the preparation of a single, compact volume?

Again, the inclusion in this chapter on writings of the matter of "proof of relationship by resemblance" seems inadvisable. The author's generalization that courts have quite generally allowed "the placing of the child and the alleged father before the jury, and allowing them to draw their own inferences as to resemblance,"[90] is very questionable. Is it not rather the safer, sounder view that mere resemblance is not admissible proof of relationship?[91] The author might also have discussed the modern trend toward the use of blood-grouping tests, in cases of disputed relationship, because of their value, not affirmatively to establish relationship, but rather negatively to dispute it.

The New York student should be reminded that McKelvey's statement, "the official registration of a motor vehicle pursuant to statute does not establish its ownership, and parol evidence is admissible to

86. P. 610.

87. Robson v. Fenniman, 83 N. J. L. 453, 85 Atl. 356 (1912).

88. Chap. 14, p. 629.

89. Chap. 10, p. 376.

90. P. 637.

91. Bilkovic v. Loeb, 156 App. Div. 719, 723, 141 N. Y. Supp. 279, 281 (1st Dept. 1913).

show the real owner,"[92] should be read in the light of existing New York law, and particularly the rule which estops a person, who causes an automobile to be registered in his name, from claiming after an accident that he was not the real owner.[93]

The many exceptions to the "parol evidence" rule are simply handled, and the author includes examples of fraud, mistake, incorrect date, conditional delivery, lack or failure of considerations, collateral agreements, customs, technical words, substitutions and latent ambiguity to stress the more important exceptions.[94] The distinction between "latent" and "patent" ambiguity is not pointed out, and the use of parol evidence in the former but not in the latter type of ambiguity ought to be set down with simple illustrations.

As previously noted, an innovation in this fifth edition is the separate chapter on "pictorial evidence."[95] The use of photographs, maps, diagrams, motion pictures, aerial pictures and x-rays is becoming so common in the trial of the modern action that separate treatment of the subject matter is desirable. And the author does treat it ably, clearly and quite completely. His distinction between the use of pictorial evidence as "illustrative" of testimony given by the witness and its use as a "witness," in "bringing the view to the court" aids in a better understanding of this particular subject matter. The value of photographs, as a practical substitute for the ancient "view by the jury" is made manifest. Stress is properly placed upon the requirements that the photograph must be a "correct representation of the scene at the time," and that "identity" must be clearly established, particularly in the use of the X-ray picture. The use of motion pictures and pictures in natural colors, when these same two requirements are met, is advocated as a step in the right direction. The New York case of *Feeney v. Young*,[96] an action for libel, involving portrayal of plaintiff in a motion picture, in which the plaintiff offered to show the picture to the jury, and upon defendant's objection it was excluded on the ground that the testimony of one who had seen the picture and identified the plaintiff was the best evidence and that the film as secondary evidence was inadmissible, is severely and justly criticized.

Of course, pictorial evidence is open to contradiction, and "photographs may be shown to be inaccurate, distorted or otherwise unreli-

92. P. 639.

93. Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406 (1915); N. Y. VEHICLE & TRAFFIC Law § 59; Shuba v. Greendonner, 271 N. Y. 189, 193, 2 N. E. (2d) 536 (1936).

94. Pp. 644 *et seq.*

95. Chap. 15.

96. 191 App. Div. 501, 181 N. Y. Supp. 481 (1st Dept. 1920).

able."[97] Similarly, where used to arouse unfairly the sympathy of the jury, exclusion of photographs is proper. Like so-called "posed" pictures, "each case must be treated on its own facts and the likelihood of assisting or misleading the jury should govern the admission of the photographs."[98]

The final chapter[99] discusses the matter of demurrers to evidence. This ancient practice has long since gone out of use in New York and generally so in other jurisdictions. Its inclusion in this new edition is justified by the author on the basis that "an understanding of the original device is desirable for the student and practitioner as an aid to an intelligent use of the methods which succeeded it."[100] And again, "in the study of the law, that which is obsolete cannot always, and perhaps should not ever, be ignored."[101] The chapter lends comprehensiveness to the treatment of the law of evidence.

This single, compact volume will prove of much help to the student of the law and will be of great value to the practitioner. The work is well done. It is the crowning achievement of a life well spent in helping thousands of law students to understand better the rules and principles of the Law of Evidence.

97. P. 705.
98. P. 700.
99. Chap. 16.
100. P. 715.
101. P. 716.

FORDHAM LAW REVIEW

Published in March and November

VOLUME XIV | MARCH, 1945 | NUMBER 1

Subscription price, $2.00 per year | *Single issue, $1.00*

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